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TIME CHANGES: GROWING COMPLEXITY IN TEXAS SENTENCING LAW*

JOHN M. SCHMOLESKY

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I. INTRODUCTION

Sentencing is a term that is often used to refer to the decision made by the judge or jury concerning the appropriate disposition for a convicted defendant in a criminal case. This narrow frame of reference obscures the role played by a number of different actors and agencies in determining what happens to those convicted of crimes. The legislature establishes appropriate sentence ranges as well as a myriad of procedural and substantive laws that impact on sentencing. The prosecutor plays a major role in determining the potential and actual disposition of a defendant by making decisions concerning the appropriate type and number of charges to file, by engaging in or refraining from plea negotiations, and by making strategic decisions about matters which affect disposition, such as whether to seek recidivist sentence enhancements. Prison administrators and parole officials make decisions that affect the length and conditions of incarceration, such as awarding and revoking good time and parole.

Thus, viewed broadly, "sentencing" is a process involving many stages and agencies, rather than just a single judicial decision. The complex relationships involved between the various components often result in one agency undercutting the decision of another. For example, a zealous prosecutor may charge a very serious offense or seek a number of convictions, only to have the judge or jury grant probation or concurrent sentences. A very lengthy sentence may result in little time served in prison if liberal awards of good time advance parole eligibility and subsequently parole is granted.

Because of the complex web of agencies that have a role in determining the disposition of a convicted defendant, changes in the rules of sentencing must be analyzed at several different levels to determine their true impact. This article will examine recent legislative changes affecting criminal sentences in Texas enacted by the Seventieth Legislature in an attempt to assess their impact. After a brief background discussion concerning the Texas system of sentencing and sentence administration, this article will review some of the major enactments of the Seventieth Legislature which appear to diminish the possibilities of early release from prison. Some of the factors which will tend to undercut the impact of the new legislation and the increasingly complex relationships between the legislative, judicial, and administrative components of the criminal justice system which have emerged after the Seventieth Legislature will be explored.

II. INDETERMINATE SENTENCING IN TEXAS

A. Parole Eligibility and Mandatory Release

In Texas, a determination of guilt by a trier of fact is not dispositive of the type or length of sentence a defendant will receive. For example, the punishment range provided by statute for a defendant convicted of a first-degree felony is life in prison or a term of five to ninety-nine years.¹ In light of the fact that probation is a possibility for a defendant convicted of a first-degree felony, the potential range of penalties is even broader than that which appears on the face of the statute.²

Broad discretion, however, is not limited to the judge or jury when determining sentence. Even when a sentence of imprisonment within the legislatively prescribed range has been selected by the trier of fact, the actual term of imprisonment is unknown at the time that sentence is imposed since the actual period of incarceration is left for determination by administrative authorities. For an inmate in the Texas prison system, there are two important dates which occur between the beginning and the expiration of the sentence selected by the judge or the jury that will determine the actual length of incarceration—the parole eligibility date and the mandatory release date. Although the Texas Board of Pardons and Paroles ("Board") is not required to grant parole when the parole eligibility date is reached, this is the earliest point at which the Board is empowered to grant release.³ If parole is granted, the balance of the term is served by the inmate in the community under supervision of a parole officer, subject to various conditions.⁴

1. See TEX. PENAL CODE ANN. § 12.32(a) (Vernon Supp. 1989) (determination of guilt of first-degree felony results in incarceration for five to ninety-nine years or life). A first-degree felon may also be fined up to \$10,000. *Id.* § 12.32(b).

2. See TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3a(a) (Vernon Supp. 1989). Upon sworn pretrial motion filed by the defendant, the jury may recommend probation for any felony conviction so long as the recommended sentence does not exceed 10 years. The court is then required to probate the sentence upon such recommendation by the jury. In addition, the court, when acting without a jury, may only assess probation for sentences of less than 10 years. *Id.* § 3. Therefore, a conviction for a first degree felony, such as murder, for which the recommended sentence is less than 10 years, may be suspended and probated. See *id.* §§ 3-3a(a).

3. See TEX. CODE CRIM. PROC. ANN. art. 42.18, § 8(a) (Vernon Supp. 1989) (authorizes release of inmates eligible for parole). With the exception of certain listed classifications, prisoners become eligible for parole when the sum of their calendar time served plus accrued good time is one-fourth of the maximum sentence imposed or 15 years, whichever is less. *Id.* § 8(b)(1).

4. See TEX. CODE CRIM. PROC. ANN. art. 42.18, § 13 (Vernon Supp. 1989) (general grant of rule-making authority to Board for conduct of persons placed on parole or released to mandatory supervision). Conditions that may be imposed upon a parolee include: restitution or reparation to the victim of his crime; repayment of court costs and fees of a public defender or appointed counsel; attendance at psychological counseling sessions or basic education

Unlike parole, which is granted solely in the discretion of the Board, an inmate must be released when the mandatory release date arrives.⁵ The mandatory release date is determined by subtracting the amount of good time earned by an inmate from the total sentence imposed.⁶ At this date, the inmate must be released from custody even if the parole board, in its discretion, has repeatedly denied early release on parole.⁷ An inmate released under mandatory release supervision serves the balance of the term under parole supervision in the same fashion as an inmate released on discretionary parole.⁸

B. *The Award of Good Time*

"Good time" is the time authorized by statute as a reward for good behavior which is deducted from or credited to the sentence to be served by an offender confined in a correctional institution.⁹ Under Texas law, the award of good time serves two functions: determination of the mandatory release date and advancement of the parole eligibility date. The mandatory release date is the date at which the defendant must be released from custody unless good time is revoked by prison officials for a violation of the rules of the institution.¹⁰ The date at which an inmate becomes eligible for parole under Texas law is also advanced for certain inmates by the award of good time.¹¹

Prior to the actions of the Seventieth Legislature, the basic rule of parole eligibility in Texas was that an inmate was eligible for parole when his actual time served plus good-conduct time equaled one-third of the maximum sentence or twenty years, whichever was less.¹² For example, an inmate sentenced to a ten-year sentence who earned no good time would become eligible for parole under this law after three years and four

classes; avoidance of all contact with his victim; agreement to intensive supervision release program, including electronic monitoring or residence at a halfway house. *See id.* § 8(g)(1)-(5). Violation of any condition of parole, however, may result in the reincarceration of the parolee. *See id.* § 14(a)-(b).

5. *See id.* § 8(c).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* § 8(a), (c).

11. *See id.* § 8(b)(1). An inmate's parole eligibility date may be advanced by the award of good time unless his conviction was for capital murder, aggravated kidnapping, aggravated sexual assault or aggravated robbery, or it is affirmatively shown that a deadly weapon was used or exhibited during the commission of an offense. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a)(1)-(2).

12. Adult Parole and Mandatory Supervision Law, ch. 427, § 2(8)(b), 1985 Tex. Gen. Laws 1549, 1551, *amended by* Prisoners—Good Conduct Time and Eligibility for Parole or Mandatory Supervision, ch. 384, § 5, 1987 Tex. Sess. Law Serv. 3756, 3759 (Vernon).

months. With the exception of inmates who have been sentenced to death, the rule remains that all inmates who enter the Texas Department of Corrections generally are put into a category in which the inmate earns twenty days for each thirty days of actual calendar time served.¹³ Thus, the end of a thirty-day month, the inmate is given credit for having served fifty days in prison. Assuming that an inmate sentenced to ten years imprisonment remained in this class I category,¹⁴ without forfeiture or gain in good time, the parole eligibility date of three years and four months (one-third of ten years) would be reduced to two years. The inmate would be required to serve at least two years in prison before the Board would have the authority to grant release. Even if the Board repeatedly denied discretionary parole, such an inmate would be mandatorily released from custody after six years unless good time was revoked for violations of disciplinary rules of the prison. The time between two years and six years is the discretionary period in which the Board is empowered, but not required, to grant parole.

Few inmates in the Texas Department of Corrections remain within the class I category of twenty days of good time per month. For violations of prison rules, an inmate could be reduced to class II or class III, earning either ten days good time per month, or no good time.¹⁵ Greater awards of good time are also possible. For example, an inmate who is awarded the designation of "trusty", which is short for trustworthy, could earn up to an additional twenty-five days of good time for each month.¹⁶ An inmate earning the maximum amount of trustworthy good time would then be earning forty-five days of good time per month¹⁷ or, in other words, seventy-five days of credit for each thirty calendar days actually served. An inmate in this category would become eligible for parole on a ten-year sentence in only one year and four months, and would reach a mandatory release date on the ten-year sentence in four years.

In addition to the statutory award of good time and trustworthy good time, it is possible to earn fifteen extra days of good time per month for

13. See TEX. REV. CIV. STAT. ANN. art. 6181-1, § 2(c) (Vernon Supp. 1989).

14. *Id.* § 3(a)(1).

15. *Id.* § 3(a)(2), § 3(a)(3)(b).

16. Prisons and Prisoners—Good Conduct Time—Amount and Time Spent in County Jail, ch. 375, § 1, 1983 Tex. Gen. Laws 2045, amended by Prisoners—Good Conduct Time and Eligibility for Parole or Mandatory Supervision, ch. 384, § 3, 1987 Tex. Sess. Law Serv. 3756, 3757 (Vernon) and Prisons and Inmates—Composition, Powers, Duties, and Continuation of Board of Corrections, Sentencing, and Claims and Actions, ch. 1049, § 14, 1987 Tex. Sess. Law Serv. 7064, 7075 (Vernon).

17. This figure is based upon the maximum of 25 days per month for a trustworthy and 20 days of class I statutory good time, since only class I inmates are eligible to become trusties. *Id.* See also TEX. REV. CIV. STAT. ANN. art. 6181-1, § 3(a)(1) (Vernon Supp. 1989).

participation and achievement in an educational, vocational, or work program.¹⁸ For example, an inmate who completed an educational program, such as a GED equivalency diploma, and who was awarded a maximum of fifteen extra good days per month for this and other achievements, could earn as much as sixty extra good days per month (twenty statutory, twenty-five trusty, and fifteen for educational/vocational awards) or ninety days of credit for thirty days actually served.¹⁹

C. *Deadly Weapon Finding and Enumerated Offenses*

One of the most important issues in Texas sentencing law is whether the judgment of conviction contains a deadly weapon finding,²⁰ or whether the conviction was for an enumerated offense²¹ such as capital murder,²² aggravated kidnapping,²³ aggravated sexual assault,²⁴ or aggravated robbery.²⁵ A convicted defendant falling into either of these categories is not eligible to have regular adult probation granted by the judge.²⁶ Furthermore, such an inmate must serve day-for-day calendar time until he is eligible for parole, or until two years have elapsed, whichever period is greater, without having that date reduced by good time.²⁷ In contrast, inmates not burdened with a deadly weapon finding or a conviction for an enumerated offense have their minimum parole eligibility date advanced based upon the amount of good time earned in custody.²⁸ The effect of this distinction can be dramatic. For example,

18. TEX. REV. CIV. STAT. ANN. art. 6181-1, § 3(d) (Vernon Supp. 1989) (awarded at the discretion of director).

19. See *supra* notes 16-18.

20. See TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a)(2) (Vernon Supp. 1989).

21. See TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a)(1) (Vernon Supp. 1989). The enumerated offenses for the purposes of determining (1) the probation eligibility, and (2) good time eligibility for the purpose of establishing the parole eligibility date are: capital murder, aggravated kidnapping, aggravated sexual assault, and aggravated (armed) robbery. *Id.*

22. TEX. PENAL CODE ANN. § 19.03 (Vernon Supp. 1989).

23. *Id.* § 20.04 (Vernon 1974).

24. *Id.* § 22.021 (Vernon Supp. 1989).

25. *Id.* § 29.03 (Vernon 1974).

26. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a)(1)-(2) (Vernon Supp. 1989). Probation may not be granted if the judge, as the trier of fact, makes an affirmative finding that a deadly weapon was used or exhibited by the defendant, or if the defendant was convicted of capital murder, aggravated kidnapping, aggravated sexual assault or aggravated robbery. *Id.* These restrictions do not apply, however, if a jury is acting as trier of fact and the defendant has no prior felony convictions and receives less than a 10-year sentence. See *id.* § 3a(a).

27. *Id.* art. 42.18, § 8(b)(1) (Vernon Supp. 1989). A defendant convicted of an enumerated offense or whose judgment contains an affirmative finding of the use or exhibition of a deadly weapon must serve the lesser of one-fourth the sentence imposed or 15 years, but in no case less than two years. *Id.*

28. *Id.* § 8(a)-(b).

under the law prior to the amendments of the Seventieth Legislature, an inmate convicted of one of the enumerated offenses who was given a sixty-year sentence was required to serve twenty years before becoming eligible for parole.²⁹ However, an inmate whose parole eligibility date was accelerated by the good-time rate earned by every inmate upon arrival at the Division of Corrections (twenty days of good time for each thirty days served) would become eligible for parole after twelve years.³⁰

III. LEGISLATIVE CHANGES IN SENTENCE ADMINISTRATION BY THE SEVENTIETH LEGISLATURE

A. *New Restrictions on the Use of Good Time*

The Seventieth Legislature promulgated an expanded list of "enumerated offenses"³¹ for which the award of good-time credits is curtailed. To the old list of capital murder, aggravated kidnapping, aggravated sexual assault and aggravated robbery, the Seventieth Legislature added: murder;³² second-degree felony for sexual assault;³³ first-degree felony for deadly assault on a law enforcement or corrections officer or court participant;³⁴ first-degree felony for injury to a child or an elderly individual;³⁵ first-degree felony for arson;³⁶ second-degree felony for robbery;³⁷ or, first-degree felony for burglary.³⁸ The additions of the frequently prosecuted offenses of sexual assault, robbery, and, in particular, burglary mean that, in the future, a greater number of convicted defendants will be ineligible for the full benefits connected with the award

29. Adult Parole and Mandatory Supervision Law, ch. 427, § 2, 1985 Tex. Gen. Laws 1549, 1551 (amended 1987).

30. Prior to the modifications made by the Seventieth Legislature, an inmate given "trustee" status could earn up to an additional 25 days per month good time and could be eligible for parole in 8 years on a 60-year sentence. Finally, additional reductions at a rate of up to 15 days per month for completion of educational and vocational programs could further advance the date of parole eligibility unless an enumerated offense or deadly weapon finding prevented such acceleration.

31. TEX. CODE CRIM. PROC. ANN. art. 42.18, § 8(c) (Vernon Supp. 1989).

32. *Id.* § 8(c)(1) (citing TEX. PENAL CODE ANN. § 19.02 (Vernon 1974)).

33. *Id.* § 8(c)(4) (citing TEX. PENAL CODE ANN. § 22.011 (Vernon Supp. 1989)).

34. *Id.* § 8(c)(7) (citing TEX. PENAL CODE ANN. § 22.03 (Vernon Supp. 1989)).

35. *Id.* § 8(c)(8) (citing TEX. PENAL CODE ANN. § 22.04 (Vernon Supp. 1989)).

36. *Id.* § 8(c)(9) (citing TEX. PENAL CODE ANN. § 28.02 (Vernon Supp. 1989)).

37. *Id.* § 8(c)(10) (citing TEX. PENAL CODE ANN. § 29.02 (Vernon 1974)).

38. *Id.* § 8(c)(12) (citing TEX. PENAL CODE ANN. § 30.02(d)(2)-(d)(3) (Vernon 1974)).

The prohibition against the accrual of good time applies only to convictions under § 30.02(d)(2) and (d)(3). *Id.* Thus, good time, for the purpose of calculating the mandatory release date, cannot be awarded a prisoner serving a sentence for committing a burglary in which any party to the crime was armed with explosives or a deadly weapon, or a burglary in which any party to the crime injured or attempted to injure anyone. *See* TEX. PENAL CODE ANN. § 30.02(d)(2)-(3) (Vernon 1974).

of good time.³⁹ Inmates convicted of offenses on this new list will continue to receive good time credit to advance parole eligibility, but they are not eligible for mandatory release and will serve their entire sentences in prison unless discretionary parole is granted.⁴⁰

This new disadvantage was also applied to those inmates who previously had been denied good time only for the purpose of accelerating parole eligibility. Prior to the modifications of the Seventieth Legislature, inmates who had been convicted of crimes from the old list of enumerated offenses or whose judgments contained an affirmative finding of the use or exhibition of a deadly weapon were awarded good time for the purpose of determining a mandatory release date, but were denied the double benefit of subtracting the good time awarded from the date of parole eligibility.⁴¹ With the added prohibition against release to mandatory supervision,⁴² such an inmate will now serve his full sentence in prison unless discretionary parole is granted by the Board.⁴³ The effect of this provision is to increase the authority of the parole board to determine the actual length of incarceration for many inmates, and, perhaps, to close the gap between the sentence imposed and the time actually served in confinement.⁴⁴

39. See TEX. DEP'T OF CORRECTIONS 1987 FISCAL YEAR STATISTICAL REP. 20 (of total inmate population of 37,855, 7,734 or 20.45% convicted of robbery, 9,607 or 25.38% convicted of burglary, and 3,845 or 10.16% convicted of sexual assault).

40. See TEX. CODE CRIM. PROC. ANN. art. 42.18, § 8(c) (Vernon Supp. 1989). The Seventieth Legislature has now provided that: "A prisoner may not be released to mandatory supervision" if there has been a deadly weapon finding or the prisoner is serving a sentence for an offense on the expanded list of enumerated offenses. *Id.* at § 8(c)(1)-(12).

41. Compare Adult Parole and Mandatory Supervision Law, ch. 427, § 2(8)(b), 1985 Tex. Gen. Laws 1549, 1551 (amended 1987) (good time not considered in calculating parole eligibility date if judgment contains deadly weapon finding or conviction is for enumerated offense) with Adult Parole and Mandatory Supervision Law, ch. 427, § 2(8)(c), 1985 Tex. Gen. Laws 1549, 1551 (amended 1987) (mandatory release date calculated by adding calendar time plus good time).

42. TEX. CODE CRIM. PROC. ANN. art. 42.18, § 8(c) (Vernon Supp. 1989).

43. *Id.*

44. Because inmates in disqualifying categories will no longer be released to mandatory supervision by operation of law, the parole board will now have to act affirmatively to grant parole or the entire sentence imposed by the judge or jury will be served in prison. However, the pressure to grant discretionary parole created by chronic prison overcrowding may well diminish the impact of these new measures. See the discussion of the impact of prison overcrowding at text accompanying footnotes 59 to 70 *infra*. If paroles are granted liberally to make more prison beds available, the ineligibility for mandatory release will be unimportant because discretionary parole will have been granted long before a mandatory release would have been required. The most important disadvantage may well be the traditional one of ineligibility for accelerated parole consideration which does not apply to the inmates convicted of crimes from the expanded list of enumerated offenses.

B. *Reduced Trusty Good Time*

The Seventieth Legislature also made changes which will affect the length of the sentence of all inmates rather than just those inmates who fall into the previously described categories. Prior to the Seventieth Legislature, inmates who were accorded the status of trusty could earn up to twenty-five *additional* days of good time per month.⁴⁵ The Seventieth Legislature amended the good-time statutes to provide that a maximum of ten additional days of good time could be awarded to a trusty.⁴⁶ In light of the fact that over ninety percent of the present Texas prison population has been awarded trusty status,⁴⁷ the fifteen-day per month reduction of the maximum amount of trusty good time is a significant factor in determining the length of time actually served in custody. Additionally, in order for an inmate to be eligible for any good time under the amendment to the good-time statutes passed by the Seventieth Legislature, the Director of the Texas Department of Corrections must certify that the inmate is "actively engaged in an agricultural, vocational, or educational endeavor or in an industrial program or other work program, unless the director finds that the inmate is not capable of participating in such an endeavor."⁴⁸

C. *Potential Limitations on Retroactive Awards of Good Time*

At the present time, one of the most important ways in which parole eligibility and mandatory release dates are advanced is through the restoration of good-conduct time that has been forfeited for prison rule violations and by the retroactive award of additional good-conduct time to inmates reclassified into higher earning categories. If an inmate violates prison rules and a prison disciplinary committee determines that some or all good time previously earned should be forfeited, the committee may, at some future time, restore all or part of the good time that was forfeited.⁴⁹ An inmate who enters the prison earning twenty days of good time for every thirty days actually served, who is reclassified as a trusty, and is given additional good time can have the new higher level applied

45. Prisons and Prisoners—Good Conduct Time—Amount and Time Spent in County Jail, ch. 375, § 1, 1983 Tex. Gen. Laws 2045 (amended 1987).

46. TEX. REV. CIV. STAT. ANN. art. 6181-1, § 3(a)(3) (Vernon Supp. 1989). The statute now reads that a trusty will receive "not more than 10 additional days . . . for each 30 days actually served" *Id.*

47. See TEX. DEP'T OF CORRECTIONS, 1987 FISCAL YEAR STATISTICAL REP. 182 (96.13% of all inmates classified as trusties); Interview with Don Keil, Classification Department of Texas Department of Corrections, in Huntsville, Texas (Feb. 15, 1988).

48. TEX. REV. CIV. STAT. ANN. art. 6181-1, § 4 (Vernon Supp. 1989).

49. *Id.*

retroactively to the beginning date of the sentence. The restoration of forfeited good time and the retroactive award of new classifications greatly accelerate parole eligibility and mandatory release. The Seventieth Legislature's amendments to the good-time statutes, however, now mandate that the Texas Board of Corrections ("TBC") annually review the Department of Corrections' rules and policies. The TBC is required to consider whether inmate overcrowding has decreased and whether it is necessary for purposes of decreasing overcrowding to restore good-conduct time or award additional good-conduct time retroactively to inmates who have been reclassified.⁵⁰ If TBC determines that overcrowding has decreased and it is not necessary to restore good-conduct time or award retroactively new grants of additional good-conduct time, "it shall direct the department to discontinue those practices."⁵¹ Although it does not appear that prison overcrowding will disappear soon,⁵² at some future time this provision may cause the actual incarceration time of inmates to increase. The addition of this language to the statutes also evinces the Legislature's increasingly stringent attitude toward the award of good time and is consistent with the other actions taken by the Seventieth Legislature.

D. Prohibition of Aggregating Consecutive Sentences for Parole Eligibility

Under Texas parole law prior to the actions of the Seventieth Legislature, it was the practice of the Board of Pardons and Parole to aggregate all consecutive sentences into one sum in order to determine the one-third or twenty-year rule for parole eligibility.⁵³ Inmates with sentences totalling more than sixty years or inmates with a life sentence became eligible for parole at twenty years.⁵⁴ Three consecutive fifty-year sentences or a sentence of ninety-nine years was no different than a sentence of sixty years for purposes of parole eligibility. If the judgment of

50. *Id.*

51. *Id.*

52. See TEX. CRIM. JUST. SUMMIT, Office of the Governor 4 (Feb. 1988). The Texas Department of Corrections ("TDC") has experienced a 147.8% increase in admissions of inmates since 1980. However, 6% less than the total number of felons convicted were actually incarcerated in 1987 as compared to 1980. Provisions are currently being made for an additional 13,356 prison beds, which is expected to absorb the increased inmate population only through 1990. *Id.* It is predicted that by the end of 1988, approximately 5,500 prisoners who have been sentenced to TDC will be held in county jails, unable to be admitted to TDC. *Id.* at 7.

53. See Adult Parole and Mandatory Supervision Law, ch. 427, § 2(8)(b), 1985 Tex. Gen. Laws 1549, 1551 (amended 1987).

54. *Id.*

conviction did not contain a deadly weapon finding or the conviction was not for one of the enumerated offenses, twenty-year parole eligibility could be further reduced in the case of the highest level trusty who also received the maximum award for participation in educational or vocational programs by a good-time award rate of ninety days for every thirty days actually served. Thus, an inmate with three ninety-nine-year sentences would automatically have a parole eligibility of twenty years. This in turn could be reduced to less than seven years if the highest categories of good time were earned.

The amendment to the Texas parole statute by the Seventieth Legislature, however, abolishes aggregation of consecutive sentences. Under the new statutes, the Board "may not treat consecutive sentences as a single sentence for purposes of parole and may not release on parole a prisoner sentenced to serve consecutive felony sentences earlier than the date on which the prisoner becomes eligible for release on parole from the last sentence imposed on the prisoner."⁵⁵ This amendment will have no impact on those inmates who are sentenced to concurrent sentences,⁵⁶ but it could greatly delay the date of eligibility for parole of those inmates serving consecutive felony sentences. Under the new law, the earliest possible parole date will be the combined total of the minimum parole term for each sentence.⁵⁷

IV. FACTORS REDUCING THE IMPACT OF THE AMENDMENTS OF THE SEVENTIETH LEGISLATURE

A. *The Impact of Prison Overcrowding and Legislative Provisions Favoring Earlier Release From Prison*

While the amendments summarized in the last section of this article appear to make actual time served in custody longer, the changes in the law have not been uniform. For example, statutory eligibility for parole was reduced by the Seventieth Legislature. The rule that an inmate is eligible for parole at one-third of his total sentence or twenty years,

55. See TEX. CODE CRIM. PROC. ANN. art. 42.18, § 8(b)(4) (Vernon Supp. 1989).

56. Concurrent sentences, by definition, must be treated as if only one sentence—the longer one—was imposed. *Id.*

57. *Id.* § 8(b)(5). The statute provides:

Calendar time served and good conduct time accrued by a prisoner that are used by the board in determining when a judgment and sentence cease to operate may not be used by the board:

(A) for the same purpose in determining that date in a subsequent sentence in the same series of consecutive sentences; or
(B) for determining the date on which a prisoner becomes eligible for release on parole from the last sentence in a series of consecutive sentences.

Id.

whichever is less, was modified to provide parole eligibility at one-fourth of the total sentence or fifteen years, whichever is less, minus good time. Thus, under the previous law, an inmate with a sentence of sixty years or more would be eligible for parole in twenty years, but now eligibility under the same sentence would occur in fifteen years, less good time.⁵⁸

The ambivalent nature of the changes made by the Seventieth Legislature is a reflection of competing political pressures. Concern about crime and a desire to be tougher with criminals may explain many of the amendments discussed in the first part of this article, but the expanding prison population and the crisis it creates may account for other provisions that seem to promote earlier release from custody. Although the legislature has authorized construction of an additional 13,356 prison beds,⁵⁹ it is projected that this increase in capacity will only absorb the expected rise in the prison population until October 1990.⁶⁰ The Texas Department of Corrections currently has a population of 38,578 inmates, 95% of its rated capacity, which reflects a 147.8% increase in admissions since 1980.⁶¹ Admissions to prison in Texas are projected to increase by 19.5% between 1988 and 1994, reaching 46,626 admissions by 1994.⁶² If these projections are accurate, the prison population will surpass prison capacity in November 1990. For this reason, the Texas Department of Corrections is recommending the funding of 11,159 additional prison beds during the 1990-91 fiscal years in order to continue to absorb the expected growth.⁶³

Mounting prison overcrowding has created strong pressure to release inmates early. The correlation between parole release and prison overcrowding in Texas has been dramatic:

In 1980 there were 168,099 offenders under regular probation supervision, in prison or in parole supervision out of which 16.9% or 28,543 were incarcerated. . . . In 1987 there were 369,449 offenders under regular probation supervision, in prison or in parole supervision out of which 10.6% or 39,227 were incarcerated.⁶⁴

The enormous increase in the number of offenders handled by the Texas criminal justice system between 1980 and 1987 resulted in more than a 6% decline in the proportion of felons in prison despite the fact that the average sentence imposed actually increased.⁶⁵ However, the average

58. See *supra* notes 12-19 and accompanying text.

59. See TEX. CRIM. JUST. SUMMIT, Office of the Governor 4 (Feb. 1988).

60. *Id.*

61. *Id.*

62. *Id.* at 10.

63. *Id.*

64. *Id.* at 4.

65. *Id.*

time served in prison by inmates released in 1987 was 12 months, less than one-fourth of the total sentence, compared with an average time served of 21.29 months in 1982, which was more than one-half of the total sentence.⁶⁶

The impact of many of the more stringent changes of the Seventieth Legislature concerning sentence administration may be blunted by the need to grant earlier discretionary parole to combat prison overcrowding. Even if the reduced awards of good time delay the date of parole eligibility for some inmates, a higher percentage of grants of parole at initial eligibility may reduce the actual average prison term in the same manner that longer sentences imposed by judges and juries are undercut by more liberal grants of parole. New statutory provisions creating ineligibility for mandatory release will matter little if chronic overcrowding creates an irresistible pressure for early grants of discretionary parole.

While it appears that many of the actions of the Seventieth Legislature may have been made in response to demands for greater truth in labeling of criminal sentences, the Legislature was also cognizant of the ever-present problem of prison overcrowding as indicated by the reduction of the parole eligibility date in some cases. Legislative ambivalence in the face of demands for tougher control of crime and the crisis of prison overcrowding is reflected in the action of the Seventieth Legislature in modifying, but retaining, the Texas Prison Management Act.⁶⁷ The Act provides another means of accelerating release from prison for some inmates. When the occupancy level of the Texas Department of Corrections reaches a level of ninety-five percent of capacity, the Act specifies that certain classes of inmates automatically become eligible for additional grants of administrative good time.⁶⁸ The grant of good time has the effect of advancing an inmate's parole eligibility and parole review dates. For example, the Prison Management Act was invoked three times in the five weeks between February 26, 1987 and April 3, 1987, giving over 6,000 inmates additional awards of good-time credit to advance parole eligibility review under the Act.⁶⁹

The Prison Management Act has provided a means which has been utilized administratively to advance parole eligibility, reduce actual time

66. *Id.* at 5.

67. See TEX. REV. CIV. STAT. ANN. art. 6184o (Vernon Supp. 1989).

68. *Id.* § 2(b).

69. Interview with Pablo Martinez, Planner for the Board of Pardons and Paroles of Texas (Mar. 1, 1988). On February 26, 1987, 6,666 eligible inmates were given an additional award of 60 days of good-conduct time. Over 6,500 inmates were given an additional 30 days one week later. One month after this award of good time, 6,420 inmates were given an additional 90 days of good-time credit. *Id.*

in confinement for certain inmates, and relieve prison overcrowding. On the other hand, the Seventieth Legislature's actions summarized above demonstrate a conflicting desire to narrow the gap between sentences imposed and time actually served by inmates. In fact, although the Prison Management Act was kept in force by the Seventieth Legislature, it was also amended to increase the categories of offenses which make an inmate ineligible for additional awards of good time.⁷⁰ Reducing sentences for convicted criminals does not appear to be a politically popular stand but neither is designating scarce resources for the construction of prisons to house more inmates. The result has been an increasingly complex and contradictory law for the administration of criminal sentences.

B. *Ex Post Facto Doctrine*

The impact of legislative provisions passed by the Seventieth Legislature which are designed to increase actual time in prison also may be diminished by judicial interpretation. One important source of limitations on legislative changes in the administration of sentences is the ex post facto doctrine. The United States Constitution forbids the passage of any "law that makes an action done before the passing of the law, and which was *innocent* when done, criminal . . . *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed."⁷¹ Article I, section 16 of the Texas Constitution also bans any "retroactive law" that has been applied to penal statutes by Texas courts.⁷²

In *Weaver v. Graham*,⁷³ the United States Supreme Court declined to restrict the ex post facto prohibition to vested rights.⁷⁴ The Court held

70. See TEX. REV. CIV. STAT. ANN. art. 6184o, § 3(b) (1)-(2) (Vernon Supp. 1989). An inmate is ineligible for grants of administrative good-time credits under this article if his judgment of conviction contains an affirmative finding that he used or exhibited a deadly weapon in the commission or immediate flight from any felony, or he was convicted of one of the following offenses: capital murder; murder; voluntary manslaughter; kidnapping; aggravated kidnapping; indecency with a child; sexual assault; aggravated sexual assault; deadly assault on law enforcement or corrections officer or court participant; injury to a child or elderly individual; incest; sale or purchase of a child; solicitation of a child; arson; robbery; aggravated robbery; first degree burglary; aggravated promotion of prostitution; compelling prostitution; sale; distribution; or display of harmful materials to minor; sexual performance by a child; deadly weapon in penal institution; or criminal attempt; conspiracy; or solicitation of any of the preceding. In addition an inmate is ineligible for administrative good-time credit if serving a sentence for: aggravated manufacture, delivery or possession of a controlled substance, or delivery, aggravated delivery or aggravated possession of marijuana. *Id.* § 3(b)(3).

71. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (emphasis in original); see also U.S. CONST. art. I, § 9, cl. 3.

72. TEX. CONST. art. I, § 16.

73. 450 U.S. 24 (1981).

74. *Id.* at 29.

that

[t]he presence or absence of an affirmative, enforceable right is not relevant . . . to the *ex post facto* prohibition. . . . [E]ven if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.⁷⁵

In *Weaver*, a 1978 state statute revised an earlier statute which specified that a prisoner would receive, depending on the number of years served in prison, five, ten, or fifteen days of good time per month if no disciplinary infractions were found against the prisoner. The revised statute limited the time granted for mere good conduct to three, six, or nine days per month. The new provision applied not only to those convicted after its passage, but also to those previously convicted who had earned good time after the effective date of the new statute. Weaver claimed this reduction would extend his time served by two years before he would reach his mandatory release date.⁷⁶

The *Weaver* Court held that reductions in good time, like changes in parole eligibility, disadvantaged prisoners by reducing their opportunity to shorten the time they serve in prison by good conduct.⁷⁷ Although the statute reducing the number of days of good time awarded per month provided for other ways to earn credit toward the prisoner's release date, it did not prevent a successful *ex post facto* challenge because the "new provision constricts the inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment."⁷⁸

Weaver demonstrates that statutes which affect parole eligibility, good time, and mandatory release are subject to *ex post facto* prohibitions. The Texas Court of Criminal Appeals indicated in *Ex parte Alegria*⁷⁹ that such changes are subject to the *ex post facto* limitations of both the federal and state constitutions. In *Ex parte Alegria*, at the time of the commission of the offense in 1961, parole eligibility for a life sentence was fifteen years, but in 1967 the statute was amended to extend

75. *Id.* at 30-31 (footnote omitted).

76. *Id.* at 32. The Court discounted the argument that since the statute would only be applied prospectively, not retrospectively, it did not lend itself to an *ex post facto* challenge. Instead, the Court asserted that it was the effect, not the form, of the law that is crucial to whether it is *ex post facto*. Concluding that good time is "one determinant of [a prisoner's] prison term—and that his effective sentence is altered once this determinant is changed," *id.* at 32, the Court held the statute substantially altered the consequences of a completed crime, and therefore changed the amount of the punishment. Thus, it could only be applied to Weaver if it did not detrimentally affect him. *Id.*

77. *Id.* at 33-34.

78. *Id.* at 35-36.

79. 464 S.W.2d 868 (Tex. Crim. App. 1971).

the period for parole eligibility to twenty years.⁸⁰ The court of criminal appeals found that application of the amended law to Alegria, who had committed the offense prior to enactment, was violative of the ex post facto proscription.⁸¹ Alegria demonstrates that the Seventieth Legislature's action in denying mandatory release for those inmates whose judgments contain a deadly weapon finding can only be applied to those who are convicted for offenses committed after the effective date of the legislation. Similarly, one convicted for an offense that was not enumerated under the prior law could not be subject to the mandatory release prohibition if the offense or any element of it occurred prior to the effective date of the Act. The same would appear to be true of the new statutory enactment requiring cumulative treatment for parole eligibility for consecutive sentences rather than the prior method of aggregation of sentences. The legislature avoided possible ex post facto ramifications by expressly stating that each of the above provisions would apply only to offenses committed after the effective date of the new legislation, September 1, 1987.⁸² Thus, the impact of the more stringent rules of sentence administration will have little immediate impact on the present Texas prison population.

Although the Prison Management Act as amended by the Seventieth Legislature contains no similar provision mandating prospective application, in *Ex parte Rutledge*,⁸³ the court of criminal appeals indicated that changes in the Act by the Seventieth Legislature restricting the list of statutory offenses eligible for the additional grants of good time were subject to ex post facto limitations.⁸⁴ Under the version of the Act in effect at the time of the commission of the offense, Rutledge would have been eligible for an additional grant of good time to advance parole eligibility if and when the Texas Department of Corrections reached an occupancy level of ninety-five percent.⁸⁵ After Rutledge was convicted, sentenced and incarcerated, the Seventieth Legislature amended the Act by listing a number of offenses that are now statutorily designated as being ineligible for the grant of extra good time.⁸⁶ Rutledge's offense fell within the amended list of newly ineligible offenses, and officials at the Texas Department of Corrections informed him that he was not eligible

80. *Id.* at 869-70.

81. *Id.* at 874 (statute automatically extending parole eligibility date unconstitutional because it "alters the situation of the petitioner to his disadvantage").

82. See TEX. CODE CRIM. PROC. ANN. art. 42.18 comment § 18(c) (Vernon Supp. 1989) (effective date Sept. 1, 1987).

83. 741 S.W.2d 460 (Tex. Crim. App. 1987) (en banc).

84. *Id.* at 462.

85. *Id.* at 460.

86. *Id.*

for the disbursement of the Act's good-time credits. The court of criminal appeals found that the amended Act had been retroactively applied in a manner that disadvantaged Rutledge in violation of the ex post facto provisions of both the federal and state constitutions.⁸⁷

Rutledge is strong authority for the proposition that any diminution in the opportunity to win good-time credits can only be given prospective application. The Seventieth Legislature wisely avoided constitutional challenges by providing that the amendments eliminating the award of good time to determine a mandatory release date for inmates whose judgments contain a deadly weapon or who are convicted of enumerated offenses only apply to offenses committed after the effective date of the new law.⁸⁸ However, new amendments which provide that there should be no restoration of forfeited good time and no retroactive credit for increased good time due to changes in classification are not limited to prospective application by statute. It is likely, however, that these amendments cannot be applied to inmates who were already sentenced prior to the effective date of the amended statute. Although the prohibition of restoration of forfeited credit and retroactive application of increased good time applies only when prison overcrowding is no longer found to exist by the Department of Corrections,⁸⁹ prison overcrowding is also a prerequisite to the applicability of the Prison Management Act, which provides extra awards of good time only when the occupancy level of the Texas Department of Corrections reaches the level of ninety-five percent of capacity.⁹⁰ This contingent application of the Prison Management Act did not prevent the *Rutledge* court from requiring prospective application of the Act.⁹¹

It appears that only one of the major amendments by the Seventieth Legislature discussed in this article would apply retroactively: the change in parole eligibility from one-third of the sentence imposed or twenty years to one-fourth of the sentence imposed or fifteen years. Because this enactment is beneficial to inmates, it is not subject to the ex post facto doctrine.⁹² Furthermore, the legislature apparently intended retroactive application because the statute contains no provision that the

87. Judge Clinton, joined by Judges Miller and Duncan, in concurrence, asserted that the state constitutional prohibition is broader than its federal counterpart because Article I, section 16 of the Texas Constitution places a ban on any "retroactive law." *Id.* at 463.

88. See *supra* note 82.

89. TEX. REV. CIV. STAT. ANN. art. 6181-1, § 4 (Vernon Supp. 1989) (upon certification by attorney general to governor, governor shall instruct that not more than 90 days good time be credited all eligible inmates).

90. *Id.* § 2(b).

91. *Ex parte Rutledge*, 741 S.W.2d 460 (Tex. Crim. App. 1987) (en banc).

92. *Weaver v. Graham*, 450 U.S. 24, 29 & n.12 (1981) (to be violative of ex post facto

earlier parole eligibility date should only apply to inmates after the effective date of the Act, and several other amendments are expressly designated for prospective application.⁹³ Thus, it appears that the immediate impact of the amendments of the Seventieth Legislature discussed in this article will be the availability of an earlier release from custody for many members of the present prison population despite the apparently more punitive thrust of much of the legislation.

The prospective changes in time computation will greatly complicate Texas sentence law and prison administration. Different sets of books will have to be maintained depending upon the date of the inmate's offense.⁹⁴ Consider, for example, the inmate who is convicted of aggravated robbery committed before the effective date of the amendments. This inmate is eligible for mandatory release. If such release is granted but later revoked based upon a conviction for a new aggravated robbery, committed after September 1, 1987, the inmate still would be eligible to earn good time on his first sentence; however, no good time would be earned on the second sentence either for the purpose of parole eligibility or for mandatory release.

C. The Number of Permissible Charges and Disposition

1. Abolition of the Texas Carving Doctrine

In order to understand sentencing law, it is necessary to consider legal rules at a number of different stages in the criminal justice process which affect the disposition of a convicted defendant. The previously discussed amendments regarding the administration of a sentence, good time, and parole change the amount of time in physical custody that an inmate convicted of a particular crime will serve. Just as post-sentence

clause, a statute must be (a) retrospective, and (b) disadvantageous to offender affected by the statute).

93. See TEX. CODE CRIM. PROC. ANN. art. 42.18, § 8(c) (Vernon Supp. 1989); TEX. REV. CIV. STAT. ANN. art. 6184o (Vernon Supp. 1989). The comments following each of the amended statutes discussed herein provide that the statute is applicable to anyone convicted of a crime, any element of which was committed after the effective date of the statute.

94. The speed with which conviction and sentencing are obtained varies greatly depending upon a number of factors, such as whether the accused was a fugitive for any period, the length of the pre-arrest investigation, and whether there was a guilty plea or a trial. As a result, the old rules may apply to someone received at the prison long after an inmate who is subject to the new rules. An individual determination must be made in order to decide which rules apply based upon the date of the commission of the offense. This date is determinative rather than the date of conviction, sentence, or other more administratively convenient dates because the concept of fair notice is implicit in the ex post facto doctrine. As the United States Supreme Court held in the landmark case of *Calder v. Bull*, the central function of the ex post facto prohibition is to prevent federal and state legislatures from enacting arbitrary or vindictive legislation. 3 U.S. (3 Dall.) 386, 389 (1798).

administration can affect time served, laws concerning events before the sentence hearing can affect the disposition of a convicted defendant. For example, limitations on the number of charges that can be brought limit a defendant's maximum sentence exposure.

For more than a century, Texas law contained a significant limitation on the number of convictions that could be obtained by the prosecution: The Texas Carving Doctrine. Although one criminal transaction often violates more than one statutory offense, the carving doctrine limited the number of convictions to the number of transactions.⁹⁵ The state could "carve" any offense that it wanted out of a single transaction, but it could only carve once.

In 1982, in *Ex parte McWilliams*,⁹⁶ the court of criminal appeals abolished the carving doctrine and adopted the federal standard based on the "same offense" test of *Blockburger v. United States*.⁹⁷ *Blockburger* provides that if one act violates more than one statutory provision, conviction is permissible for each offense so long as each statutory offense contains an element that the other offense does not.⁹⁸ Unlike the carving doctrine which focuses on the number of acts of the defendant, the *Blockburger* test focuses upon the abstract elements of the offenses.⁹⁹ Under *Blockburger*, convictions are possible for multiple statutory offenses despite a significant overlap in facts proved at trial for each offense.¹⁰⁰ For example, in *Gore v. United States*,¹⁰¹ the defendant sold heroin on two occasions. Two transactions occurred and Gore was convicted twice on each of the following offenses: selling heroin with knowledge that the substance was imported; selling heroin not in a stamped package; and selling heroin without a prescription.¹⁰² The proof of each of the three statutory offenses was virtually identical, but three convictions and consecutive sentences were permitted for each transaction.¹⁰³

The combination of the demise of the carving doctrine and the enactment of new statutory provisions providing that consecutive sentences will no longer be cumulated in determining parole eligibility appear to provide potentially more stringent sentences for convicted Texas defendants. However, other judicial and legislative developments concerning

95. *Ex parte McWilliams*, 634 S.W.2d 815, 823 (Tex. Crim. App. 1982) (en banc).

96. 634 S.W.2d 815 (Tex. Crim. App. 1982) (en banc).

97. *Blockburger v. United States*, 284 U.S. 299 (1932). See *Ex parte McWilliams*, 634 S.W.2d 815, 822, 824 (Tex. Crim. App. 1982) (en banc).

98. *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

99. *Id.*

100. See *id.*

101. 357 U.S. 386 (1958).

102. *Id.* at 387.

103. *Id.* at 386.

joinder of offenses and double jeopardy protections complicate the issue and appear to militate in favor of more concurrent and fewer consecutive sentences in Texas.

2. *The Partial Revival of the Carving Doctrine*

Although Texas has abolished the carving doctrine, recent cases have revived the approach taken by the carving doctrine by focusing on the defendant's acts rather than the elements of the statutes in cases where multiple trials rather than just multiple convictions were involved. This partial revival of the carving doctrine began in *May v. State*.¹⁰⁴ May was convicted of involuntary manslaughter based upon an indictment which alleged that she operated a motor vehicle while intoxicated and, by reason of her intoxication, drove her vehicle across the center median, colliding with a car and killing the victim.¹⁰⁵ Following the involuntary manslaughter conviction, May filed a habeas corpus petition asking for dismissal of a pending driving-while-intoxicated prosecution.¹⁰⁶ The trial court denied relief and the court of appeals affirmed in a straightforward application of *Blockburger* principles.

Comparing the elements of the two offenses, the court found that each offense required proof of facts that the other did not: involuntary manslaughter requires proof of intoxication causing the death of an individual, and operating a motor vehicle while intoxicated requires proof of operating a motor vehicle upon a public road, highway, street or alley.¹⁰⁷ Because the two offenses, as they appear in the Texas Penal Code, contain separate elements, the offenses were held not to be the same offense for double jeopardy purposes. Thus, the court of appeals determined that the prior involuntary manslaughter conviction did not bar a later driving-while-intoxicated conviction.

May argued that the driving-while-intoxicated prosecution should be barred because that pending indictment alleged the same act of crossing the median of a highway and colliding with another vehicle while intoxicated that was an essential part of the state's involuntary manslaughter case.¹⁰⁸ The court of criminal appeals held that whether proof of the same act was involved in both convictions was irrelevant to the *Blockburger* analysis adopted by the court of criminal appeals¹⁰⁹ because,

104. 726 S.W.2d 573 (Tex. Crim. App. 1987).

105. *Id.* at 576.

106. *Id.* at 574.

107. *Id.*

108. *Id.* at 576-77.

109. *Id.* at 574.

as the *Ex parte McWilliams*¹¹⁰ opinion noted:

The *Blockburger* test is satisfied if each statutory offense requires the proof of a fact that the other does not. At trial there may be a substantial overlap in the proof of each offense; however, it is the *separate statutory elements* of each offense which must be examined under this test.¹¹¹

The court of criminal appeals reversed the court of appeals, drawing a distinction between multiple punishments at a single trial and successive prosecutions.¹¹² A second prosecution may be barred on double jeopardy grounds if the second prosecution involves relitigation of factual issues already resolved by the first.¹¹³ Although *McWilliams* abandoned the carving doctrine,¹¹⁴ *Blockburger* was not adopted as the sole test for determining jeopardy where an act violates two distinct statutes.¹¹⁵ According to *May*, where successive prosecutions are involved, the carving doctrine approach of examining the facts of the two cases is appropriate, rather than the *Blockburger* approach of examining only the statutory elements. The latter approach is appropriate only when multiple convictions against one defendant are obtained at a single trial.¹¹⁶ Thus, *May*'s information charging driving while intoxicated was ordered dismissed because the pending information charged a crime "consisting solely of one or more of the elements of the crime for which she has already been convicted."¹¹⁷

A few months after *May*, *Ex parte Peterson*¹¹⁸ demonstrated that the sequence of prosecutions is irrelevant to the analysis in *May*.¹¹⁹ In *Ex parte Peterson*, the less serious driving-while-intoxicated prosecution occurred first,¹²⁰ and a later involuntary manslaughter charge was dismissed based on the same analysis as in *May*.¹²¹ The court of criminal appeals again held that even if a comparison of the two statutes reveals elements sufficiently different to permit consecutive sentences, successive prosecutions will be barred if the second prosecution requires relitigation of factual issues already resolved by the first.¹²² *Peterson*'s pending in-

110. 634 S.W.2d 815 (Tex. Crim. App. 1982) (en banc).

111. *Id.* at 824 (emphasis in original).

112. *May v. State*, 726 S.W.2d 573, 576-77 (Tex. Crim. App. 1987).

113. *Id.* at 575 (quoting *Davis v. Herring*, 800 F.2d 513, 518 (5th Cir. 1980)).

114. *Ex parte McWilliams*, 634 S.W.2d 815, 824 (Tex. Crim. App. 1982) (en banc).

115. *May v. State*, 726 S.W.2d 573, 577 (Tex. Crim. App. 1987).

116. *Id.* at 577.

117. *Id.* at 576-77.

118. 738 S.W.2d 688 (Tex. Crim. App. 1987).

119. *Id.* at 690-92.

120. *Id.* at 689.

121. *Id.* at 691.

122. *Id.*

voluntary manslaughter prosecution was dismissed¹²³ because Peterson already had been convicted of driving while intoxicated, a conviction arising out of the same automobile accident alleged in the involuntary manslaughter indictment.¹²⁴

The partial revival of the carving doctrine where successive prosecutions are involved, rather than multiple punishments at the same trial, has not been limited to the driving-while-intoxicated/involuntary manslaughter pairing of offenses. The court of criminal appeals and several courts of appeals have applied the rationale of *May* and *Ex parte Peterson* in cases involving different types of offenses.¹²⁵

3. Joinder and Concurrent Sentences

a. Law Prior to Seventieth Legislature

The distinction developed in *May* and *Ex parte Peterson* between multiple punishments at one trial and separate punishments at successive trials suggests a prosecution strategy of consolidating charges in one prosecution where the prosecutor deems multiple punishments to be appropriate. However, other developments in the law of joinder either make such consolidation difficult or often will require that the defendant receive concurrent sentences if joinder is accomplished. When the law concerning joinder and consolidation of offenses is considered together with the partial revival of the carving doctrine for successive prosecutions, the potential sentence exposure of convicted defendants is diminished, and the impact of legislative changes forbidding the cumulation of consecutive sentences for parole eligibility purposes is severely reduced.

To appreciate the impact of joinder and consolidation on potential sentence length, a brief survey of the law in this area is necessary. Recently, in *Fortune v. State*,¹²⁶ the court of criminal appeals set forth the two basic rules that had governed joinder of offenses under the prior statute:

- (1) the State may allege more than one offense in a single charging instrument if the offenses constitute the repeated commission of the same property offense under Title 7 of the Penal Code; and (2) the State may not allege more than one non-property offense in a single charging instrument regardless of the number of the transactions involved.¹²⁷

The *Fortune* court explained that the first rule is derived from article

123. *Id.* at 691-92.

124. *Id.* at 691.

125. *See, e.g.,* *Herrera v. State*, 756 S.W.2d 120 (Tex. App.—Fort Worth 1988, no pet.).

126. 745 S.W.2d 364 (Tex. Crim. App. 1988) (en banc).

127. *Id.* at 366.

21.24 of the Texas Code of Criminal Procedure which provides in part that: "[t]wo or more offenses may be joined in a single indictment, information, or complaint, with each offense stated in a separate count, if the offenses arise out of the same criminal episode, as defined in Chapter 3 of the Penal Code."¹²⁸ Prior to the revisions of the Seventieth Legislature, the term "criminal episode" was defined narrowly in section 3.01 of the Texas Penal Code as "the repeated commission of any one offense defined in Title 7 [of the Penal Code] (Offenses Against Property)."¹²⁹

The second rule stated above from *Fortune* is also derived from a narrow reading of article 21.24 of the Texas Code of Criminal Procedure and section 3.01 of the Texas Penal Code which has been interpreted to allow "the joinder of more than one offense in a charging instrument *only* when it is the repeated commission of the same property offense."¹³⁰ Thus, as the court of criminal appeals delineated in *Fortune*, one charging instrument may not: "1) allege more than one non-property offense, 2) allege statutorily different property offenses, or; 3) allege one property and one non-property offense."¹³¹

When the state violates the joinder rules, the defense can file a motion to quash the indictment which should be granted if any of the three situations listed above occur.¹³² A second option for the defense is not to file the motion to quash but instead to file a motion requesting that the state be made to elect the count upon which it will proceed.¹³³ An election to proceed on only one count will cure the joinder error, even if a motion to quash previously was erroneously overruled. The state must make the election by the end of the state's case and before the defense begins to present evidence. However, if the defense files neither a motion to quash nor a motion for election, misjoinder may still be challenged on appeal because the error is regarded as fundamental based on the theory that the trial court was without authority to render the second judgment of conviction.¹³⁴ Despite the recent trend to require objection to charging instruments and to move away from the concept of fundamental error, the opportunity to challenge a misjoinder on appeal despite the

128. *Id.* (quoting TEX. CODE CRIM. PROC. ANN. art. 21.24(a) (Supp. 1989)).

129. *Id.* (quoting TEX. PENAL CODE ANN. § 3.01 (Vernon 1974 & Supp. 1989)). *See also* TEX. PENAL CODE ANN. §§ 28.01-33.05 (Vernon 1974 & Supp. 1989). Title VII offenses are: arson, criminal mischief and other property damage or destruction, robbery, aggravated robbery, burglary, criminal trespass, theft, fraud and computer crimes. *Id.*

130. *Fortune v. State*, 745 S.W.2d 364, 367 (Tex. Crim. App. 1988) (en banc) (emphasis in original).

131. *Id.*

132. *Id.* at 368.

133. *Id.*

134. *Id.*

absence of objection was recently reaffirmed in *Fortune*.¹³⁵

Two situations must be distinguished from the foregoing discussion of the rules of joinder: pleading in the alternative and consolidation. Where the prosecutor is unaware of the exact nature of the proof at trial, the prosecutor may plead alternative crimes in separate counts at one trial,¹³⁶ or he may create separate paragraphs based upon the same count to allege alternative methods and means of committing the same crime.¹³⁷ Pleading in the alternative is not a joinder problem because only one offense has occurred, and the jury is instructed that only one verdict can be returned. For this reason, the state is not required to elect a particular alternative.¹³⁸

Consolidation also must be distinguished from joinder. Consolidation brings together two or more adequately pleaded separate indictments, which charge offenses arising from different transactions, to be tried together.¹³⁹ Although the distinction between joinder and consolidation may appear to be hypertechnical, there is a crucial difference: consolidation may only occur with the consent of the defendant,¹⁴⁰ while joinder, if proper and upon adequate notice, can occur without the consent of the defendant. Thus, the defendant can prevent consolidation by objecting, although diligence is required because failure to object may be construed as implied consent. Sentences for offenses separately indicted and then consolidated may be consecutive.¹⁴¹

Joinder of offenses involving the repeated commission of Title VII offenses may occur without the consent of the defendant, and the defendant has no right to demand such joinder. Prior to the Seventieth Legislature, joinder was allowed only in this limited situation, but the defendant received an important benefit related to disposition where joinder occurred. If notice had been duly given to consolidate several indictments of the same Title VII offense, section 3.03 of the Texas Penal Code required that the sentences run concurrently.¹⁴²

b. Law after Seventieth Legislature

The joinder rules have been significantly altered by the Seventieth

135. *Id.* at 369-70.

136. TEX. CODE CRIM. PROC. ANN. art. 21.24(a) (Vernon Supp. 1989).

137. *Id.* art. 21.24(b).

138. *Fortune v. State*, 745 S.W.2d 364, 370 (Tex. Crim. App. 1988) (en banc).

139. TEX. PENAL CODE ANN. § 3.02 (Vernon 1974).

140. *Id.* § 3.04 (Vernon 1974) (defendant has the right to a severance of consolidated offenses).

141. *Fortune v. State*, 745 S.W.2d 364, 368 (Tex. Crim. App. 1988) (en banc).

142. TEX. PENAL CODE ANN. § 3.03 (Vernon 1974 & Supp. 1989).

Legislature's amendment of section 3.01 of the Texas Penal Code, changing the definition of the term criminal episode. As of September 1, 1987, "criminal episode" means the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances: (1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or (2) the offenses are the repeated commission of the same or similar offenses.¹⁴³

Under the previous restricted definition of criminal episode, joinder of more than one offense within a single indictment was limited to the repeated commission of a single *property* crime, and all other combinations of offenses within the same charging instrument were considered misjoinder. After the amendment, however, offenses no longer must be the same offense so long as they are similar offenses. It is no longer necessary that the offenses be the repeated commission of the same property offense, because now two or more transactions involving any type of crime connected by a common scheme or plan will suffice to permit joinder of all offenses arising from that transaction within the same charging instrument.

Misjoinder apparently is limited now to the joinder of two or more statutorily distinct offenses that are alleged to have occurred pursuant to two *unrelated* transactions. Only in this situation would it be necessary to obtain the defendant's consent to consolidate offenses, and as before, the defendant can prevent consolidation of offenses by objecting. Although a much broader range of offenses can be joined now without the defendant's consent, the benefit of concurrent sentences provided by section 3.03 of the Texas Penal Code remains unchanged and applies to this broader range of permissibly joined offenses.¹⁴⁴

4. *Charging and Disposition: The New Balance of Power*

There have always been complex relationships in the law of joinder, double jeopardy and carving, and the administration of cumulative criminal sentences. Recent changes in the law of each of these areas has altered the relationships in surprising and paradoxical ways. The demise of the carving doctrine in *Ex parte McWilliams* appeared to remove restrictions on the state's ability to obtain multiple convictions.¹⁴⁵ The stated reason for abandoning carving in *McWilliams* was that the limita-

143. See TEX. PENAL CODE ANN. § 3.01 (Vernon Supp. 1989).

144. *Id.* § 3.03 (Vernon 1974) (although conviction may be had on all counts properly consolidated at trial, sentences must run concurrently).

145. See *supra* notes 96-102 and accompanying text.

tion of one conviction per transaction encouraged crime.¹⁴⁶ The action of the Seventieth Legislature in eliminating the cumulation of consecutive sentences for determining parole eligibility would appear to reinforce the state's purpose in pursuing multiple convictions and consecutive sentences. By prohibiting cumulation of consecutive sentences into one aggregated offense for parole eligibility, the Seventieth Legislature appears to have found a method to ensure that the greater potential for multiple sentences will translate into more time served in prison.

On the other hand, the action of the same Legislature in greatly expanding the previously narrow range of cases subject to joinder without the defendant's consent, while retaining the concomitant requirement of concurrent treatment of charges so joined, appears to create an incentive for more concurrent sentences.¹⁴⁷ The new definition of criminal episode which allows for more liberal joinder is permissive, not mandatory, and the prosecution can skirt the concurrent sentence provision of section 3.03 of the Texas Penal Code simply by not joining the charges in one trial and obtaining multiple convictions in successive prosecutions. The defendant has no right to demand such joinder; the defendant's only right is the absolute right to demand severance under section 3.04 of the Texas Penal Code.¹⁴⁸

However, in addition to the significant cost to already limited prosecutorial resources caused by the need to conduct separate trials, there is the possible loss of the opportunity to prosecute a second case created by the partial revival of the carving doctrine. *May* and *Ex parte Peterson* have recognized that the second prosecution may be barred if the state's case requires relitigation of facts already developed in the first trial, even if the statutory offenses involved in both prosecutions are separate and distinct under the *Blockburger* standard.¹⁴⁹ The prosecutor may eschew the opportunity to join two or more offenses committed pursuant to the same transaction because of the loss of the opportunity to obtain consecutive sentences, only to find that a second trial is blocked because proof of important elements of a second charge were already litigated in a previous trial. Those offenses arising from the same transaction which must clearly be joined in one trial, and thus are subject to the concurrent sentence protection, are also the type of offenses which are more likely to be subject to the prohibition of relitigation of the same essential facts.

To the extent that two or more offenses result from completely unre-

146. *Ex parte McWilliams*, 634 S.W.2d 815, 822 (Tex. Crim. App. 1982) (en banc).

147. *See supra* notes 131-45 and accompanying text.

148. *See* TEX. PENAL CODE ANN. § 3.04 (Vernon 1974).

149. *See supra* notes 104-24 and accompanying text.

lated transactions, they will not be subject to the relitigation of the same facts protection recognized in *May* and *Ex parte Peterson*, and such offenses would not be susceptible to joinder. However, a defendant can prevent multiple convictions and sentences for offenses arising from unrelated transactions at one trial by objecting to misjoinder.¹⁵⁰ If the state is going to obtain multiple convictions in these circumstances, the state must be willing to conduct separate prosecutions. Of course, the defendant can make this much easier for the prosecution by pleading guilty to several charges and waiving any consolidation objections. However, the chief bargaining tool of a criminal defendant is the ability to require the state to go through the cost, uncertainty, and time of a criminal trial on every charge. The combination of (1) the power of the defense to force separate trials of unrelated offenses by objecting to consolidation; (2) the protection afforded to the defense of concurrent sentences for joined related offenses; and (3) the potential double jeopardy claim which can be made to successive prosecution of related offenses give the defense some bargaining power in plea negotiations. This bargaining power may offset some of the increased potential leverage gained by the prosecution through the abolition of the carving doctrine, the expanded power to join different offenses in one prosecution, and the new rules prohibiting cumulation of consecutive sentences.

V. CONCLUSION

Several sentence administration amendments of the Seventieth Legislature appear to make sentences in Texas more onerous. A number of statutory offenses are now designated to be ineligible for mandatory release, thus making early release from prison dependent upon executive grace. The maximum award of good time available to inmates has been reduced and the retroactivity of individual increases in good time and restoration of forfeited good time is threatened. Consecutive sentences no longer may be cumulated into one aggregate sentence in determining minimum parole eligibility. Additional statutory offenses have been added to the list of those ineligible for the benefits of the Prison Management Act.

Yet despite the apparently more punitive thrust of the new legislation, a number of factors combine to undercut its impact. The Seventieth Legislature's general reduction in the date of parole eligibility will apply to inmates already sentenced, while the more punitive provisions will be applied prospectively by statute or because of the demands of the *ex post*

150. See TEX. PENAL CODE ANN. § 3.04 (Vernon 1971) (defendant has absolute right to sever offenses not properly joined in one trial).

facto doctrine. The history of more liberal grants of parole release caused by the continuing pressure of prison overcrowding suggest that smaller awards of good time will not translate into longer average periods of incarceration. More liberal rules of joinder with concomitant concurrent sentence guarantees combine with increased double jeopardy protections to create a likelihood of fewer consecutive sentences in the future, while the new rules providing more stringent treatment of consecutive sentences do not apply retroactively.

No clear policy direction has emerged from legal developments in the law affecting the disposition of criminal defendants, but it is clear that the complexity and the possibility of confusion have expanded. A number of different rules of sentence administration will apply depending upon the date of the inmate's conviction. Offenses that make a convicted defendant ineligible for good-time advancement of parole eligibility now differ from the offenses triggering ineligibility for good time to determine mandatory release. Depending upon the type of probation involved and whether the judge or jury determines sentence, the eligibility rules for probation vary, and these rules differ from those concerning eligibility for parole, mandatory release, and various types of administrative good-time credit.

In evaluating criminal cases, prosecutors and defense attorneys will have to weigh a myriad of rules concerning probation, parole, and good time, all of which affect the actual disposition of a convicted defendant. Charging strategies, plea negotiations, and lesser included offense decisions cannot be undertaken intelligently without consideration of the rules of sentence administration. Understanding the intricate and complex interrelationships among the numerous agencies and rules that affect the disposition of a convicted defendant is essential to effective prosecution and defense of criminal cases.